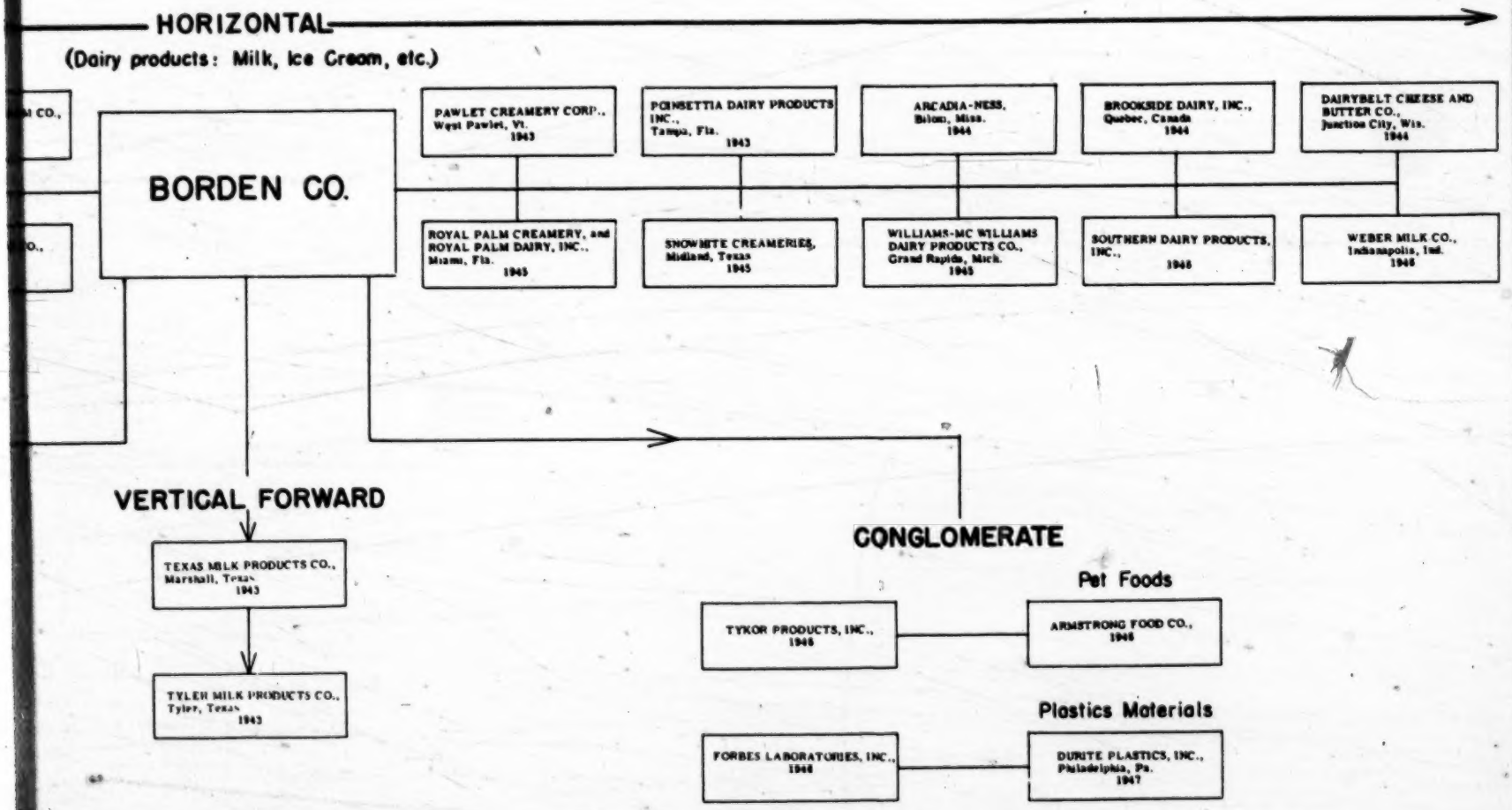
CHART I

# ACQUISITIONS OF THE BORDEN CO., 1940-47




ORATION

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

Syllabus

## UNITED STATES *v.* AMERICAN BUILDING MAINTENANCE INDUSTRIES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 73–1689. Argued April 22, 1975—Decided June 24, 1975

The Government brought this civil antitrust action against appellee, one of the largest suppliers of janitorial services in the country, with 56 branches serving more than 500 communities in the United States and Canada, and providing about 10% of such service sales in Southern California, contending that appellee's acquisition of two Southern California janitorial service firms (the Benton companies), which supplied about 7% of such services in Southern California, violated § 7 of the Clayton Act. That section provides that "[n]o corporation engaged in commerce shall acquire . . . the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire . . . the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." The Benton companies, some of whose customers engaged in interstate operations, performed all their services within California, locally recruited labor (which accounted for their major expenses) and locally purchased incidental equipment and supplies. The District Court granted appellee's motion for summary judgment, holding that there had been no § 7 violation. The Government contends that "engaged in commerce" as used in § 7 encompasses corporations like the Benton companies engaged in intrastate activities that substantially affect interstate commerce, and that in any event the Benton companies' activities were sufficiently interstate to come within § 7. *Held:*

1. The phrase "engaged in commerce" as used in § 7 of the Clayton Act means engaged in the flow of interstate commerce,

and was not intended to reach all corporations engaged in activities subject to the federal commerce power; hence, the phrase does not encompass corporations engaged in intrastate activities substantially affecting interstate commerce, and § 7 can be applicable only when both the acquiring corporation and the acquired corporation are engaged in interstate commerce. Pp. 3–11.

(a) The jurisdictional requirements of § 7 cannot be satisfied merely by showing that allegedly anticompetitive acquisitions and activities *affect* commerce. *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U. S. 186; *FTC* v. *Bunte Bros.*, 312 U. S. 349. Pp. 4–5.

(b) The precise "in commerce" language of § 7 is not coextensive with the reach of power under the Commerce Clause and is thus not to be equated with § 1 of the Sherman Act which reaches the impact of intrastate conduct on interstate commerce. Pp. 6–8.

(c) When Congress re-enacted § 7 in 1950 with the same "engaged in commerce" limitation, the phrase had long since become a term of art, indicating a limited assertion of federal jurisdiction, and prior to that time Congress had frequently distinguished between activities "in commerce" and broader activities "affecting commerce." Pp. 8–10.

(d) Limiting § 7 to its plain meaning comports with the enforcement policies that the FTC and the Justice Department have consistently pursued. Pp. 10–11.

2. Since the Benton companies did not participate directly in the sale, purchase, or distribution of goods or services in interstate commerce, they were not "engaged in commerce" within the meaning of § 7. And neither supplying local services to corporations engaged in interstate commerce nor using locally bought supplies manufactured outside California sufficed to satisfy § 7's "in commerce" requirement. Pp. 11–13.

— F. Supp. —, affirmed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and MARSHALL, POWELL, and REHNQUIST, JJ., joined, and in all but Part III of which WHITE, J., joined. WHITE, J., filed an opinion concurring in the judgment. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN, J., joined. BLACKMUN, J., filed a dissenting opinion.

# SUPREME COURT OF THE UNITED STATES

No. 73–1689

United States, Appellant, v. American Building Maintenance Industries. | On Appeal from the United States District Court for the Central District of California.

[June 24, 1975]

MR. JUSTICE STEWART delivered the opinion of the Court.

The Government commenced this civil antitrust action in the United States District Court for the Central District of California, contending that the appellee, American Building Maintenance Industries, had violated § 7 of the Clayton Act, 15 U. S. C. § 18, by acquiring the stock of J. E. Benton Management Corp., and by merging Benton Maintenance Co. into one of the appellee's wholly owned subsidiaries. Following discovery proceedings and the submission of memoranda and affidavits by both parties, the District Court granted the appellee's motion for summary judgment, holding that there had been no violation of § 7 of the Clayton Act. The Government brought an appeal to this Court, and we noted probable jurisdiction. 419 U. S. 1104.[1]

I

The appellee, American Building Maintenance Indus-

[1] The Government appealed directly to this Court pursuant to § 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U. S. C. § 29. The Government's notice of appeal was filed on February 7, 1974, before the effective date of the recent amendments to the Act. See Antitrust Procedures and Penalties Act, Pub. L. No. 93–528, § 7, 88 Stat. 1710.

tries, is one of the largest suppliers of janitorial services in the country, with 56 branches serving more than 500 communities in the United States and Canada. It is also the single largest supplier of janitorial services in Southern California (the area comprising Los Angeles, Orange, San Bernardino, Riverside, Santa Barbara, and Ventura Counties), providing approximately 10% of the sales of such services in that area.

Both of the acquired corporations, J. E. Benton Management Corp. an Benton Maintenance Co., also supplied janitorial services in Southern California.[2] Together their sales constituted approximately 7% of the total janitorial sales in that area. Although both Benton companies serviced customers engaged in interstate operations, all of their janitorial and maintenance contracts with those customers were performed entirely within California. Neither of the Benton companies advertised nationally, and their use of interstate communications facilities to conduct business was negligible.[3]

The major expense of providing janitorial services is the cost of the labor necessary to perform the work. The

[2] At the time of the acquisition and merger, Jess E. Benton, Jr., owned all the stock of J. E. Benton Management Corp., and 85% of the stock of Benton Maintenance Co. In addition to supplying janitorial services, Benton Management conducted some real estate business and provided building management services entirely within the Southern California area. Benton Maintenance was engaged exclusively in providing janitorial services. The Government has made no claim that the nonjanitorial activities of Benton Management Corp. have any bearing on the issues presented by this case.

[3] The District Court found that the Benton corporations made only 10 out-of-state telephone calls related to business activities during the 18-month period prior to the challenged acquisition and merger. The charges for those calls were $19.78. During the same period the Benton companies sent or received only some 200 interstate letters, a number of which were either directed to or received from governmental agencies such as the Internal Revenue Service.

Benton companies recruited the unskilled workers needed to supply janitorial services entirely from the local labor market in Southern California. The incidental equipment and supplies utilized in providing those janitorial services, except in concededly insignificant amounts, were purchased from local distributors.[4]

It is unquestioned that the appellee, American Building Maintenance Industries, was and is actively engaged in interstate commerce. But on the basis of the above facts the District Court concluded that at the time of the challenged acquisition and merger neither Benton Management Corp. nor Benton Maintenance Co. was "engaged in commerce" within the meaning of § 7 of the Clayton Act. Accordingly, the District Court held that there had been no violation of that law.

The Government's appeal raises two questions: First, does the phrase "engaged in commerce" as used in § 7 of the Clayton Act encompass corporations engaged in intrastate activities that substantially affect interstate commerce? Second, if the language of § 7 requires proof of actual engagement in the flow of interstate commerce, were the Benton companies' activities sufficient to satisfy that standard?

II

Section 7 of the Clayton Act, 15 U. S. C. § 18, provides in pertinent part:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of

[4] Although many of the janitorial supplies were manufactured outside of California, the District Court found that Benton's direct interstate purchases for the 16-month period prior to the challenged acquisition and merger amounted to a total of less than $140.

> the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

Under the explicit reach of § 7, therefore, not only must the acquiring corporation be "engaged in commerce," but the corporation or corporations whose stock or assets are acquired must be "engaged also in commerce." [5]

The distinct "in commerce" language of § 7, the Court observed earlier this Term, "appears to denote only persons or activities within the flow of interstate commerce—the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer. If this is so, the jurisdictional requirements of [§ 7] cannot be satisfied merely by showing that allegedly anticompetitive acquisitions and activities *affect* commerce." *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U. S. 186, 195. But even more unambiguous support for this construction of the narrow "in commerce" language enacted by Congress in § 7 of the Clayton Act is to be found in an earlier decision of this Court, *FTC v. Bunte Bros.*, 312 U. S. 349.

In *Bunte Bros.* the Court was required to determine the scope of § 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. § 45, which authorized the Commission to proceed only against "unfair methods of competition in commerce." The Court squarely held that the Commission's § 5 jurisdiction was limited to unfair methods of competition occurring in

[5] "Commerce," as defined by § 1 of the Clayton Act, 15 U. S. C. § 12, means "trade or commerce among the several States and with foreign nations . . . ." The phrase "engaged in commerce" is not defined by the Act.

the flow of interstate commerce. The contention that "in commerce" should be read as if it meant "affecting interstate commerce" was emphatically rejected: "The construction of § 5 urged by the Commission would thus give a federal agency pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom or local law. . . . An inroad upon local conditions and local standards of such far-reaching import as is involved here, ought to await a clearer mandate from Congress." *Id.*, at 354–355.[6]

The phrase "in commerce" does not, of course, necessarily have a uniform meaning whenever used by Congress. See, *e. g.*, *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 520–521. But the *Bunte Bros.* construction of § 5 of the Federal Trade Commission Act is particularly relevant to a proper interpretation of the "in commerce" language in § 7 of the Clayton Act since both sections were enacted by the 63rd Congress, and both were designed to deal with closely related aspects of the same problem—the protection of free and fair competition in the Nation's marketplaces. See *FTC* v. *Raladam Co.*, 283 U. S. 643, 647–648.

The Government argues, however, that despite its basic identity to § 5 of the Federal Trade Commission Act, the phrase "engaged in commerce" in § 7 of the Clayton Act should be interpreted to mean engaged in

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[6] Congress recently acted to provide such a "clearer mandate," amending the Federal Trade Commission Act by replacing the phrase "in commerce" with "in or affecting commerce" in §§ 5, 6, and 12 of the Act. Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 93–637, § 201, 88 Stat. 2193. The amendments were specifically designed to expand the Commission's jurisdiction beyond the limits defined by *Bunte Bros.* and to make it coextensive with the constitutional power of Congress under the Commerce Clause. See H. R. Rep. No. 93–1107, 93d Cong., 2d Sess., 29–31.

any activity that is subject to the constitutional power of Congress over interstate commerce. The legislative history of the Clayton Act, the Government contends, demonstrates that the "in commerce" language of § 7 was intended to be coextensive with the reach of congressional power under the Commerce Clause. Moreover, the argument continues, § 7 was designed to supplement the Sherman Act and to arrest the creation of trusts or monopolies in their incipiency, *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 589, and it would be anomalous, in light of this history and purpose, to hold that the Clayton Act's jurisdictional scope is more restricted than that of the Sherman Act.

It is certainly true that the Court has held that in the Sherman Act, "Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements . . . ." *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 558. Accordingly, the Sherman Act has been applied to local activities which, although not themselves within the flow of interstate commerce, substantially affect interstate commerce. See, *e. g.*, *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219; *United States* v. *Employing Plasterers Assn.*, 347 U. S. 186. But the Government's argument that § 7 should likewise be read to reach intrastate corporations affecting interstate commerce is not persuasive.

Unlike § 7, with its precise "in commerce" language, § 1 of the Sherman Act, 15 U. S. C. § 1, prohibits every contract, combination, or conspiracy "in restraint of trade or commerce among the several States . . . ." "The jurisdictional reach of § 1 thus is keyed directly to effects on interstate markets and the interstate flow of goods." *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U. S., at 194. No similar concern for the impact of intrastate conduct

on interstate commerce is evident in § 7's "engaged in commerce" requirements.

The Government's contention that it would be anomalous for Congress to have strengthened the antitrust laws by curing perceived deficiencies in the Sherman Act and at the same time to have limited the jurisdictional scope of those remedial provisions founders also on the express language of § 7. Thus, although the Sherman Act proscribes *every* contract, combination, or conspiracy in restraint of trade or commerce, whether entered into by a natural person, partnership, corporation, or other form of business organization, § 7 of the Clayton Act is explicitly limited to *corporate* acquisitions. Yet it surely could not be seriously argued that this "anomaly" must be ignored, and § 7 extended to reach an allegedly anticompetitive acquistion of partnership assets.[7] There is no more justification for concluding that the equally explicit

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[7] The Federal Trade Commission has held that such acquisitions may be challenged under § 5 of the Federal Trade Commission Act, which forbids unfair methods of competition on the part of persons and partnerships, as well as corporations. *Beatrice Foods Co.*, 67 F. T. C. 473, 724–727. It is, of course, well established that the Commission has broad power to apply § 5 to reach transactions which violate the standards of the Clayton Act, although technically not subject to the Act's prohibitions. *See, e. g., FTC* v. *Brown Shoe Co.*, 384 U. S. 316, 320–321; cf. *FTC* v. *Sperry & Hutchinson Co.*, 405 U. S. 233. We have no occasion in the case now before us to decide whether application of § 5 to assets acquisitions by or from noncorporate business entities constitutes an appropriate exercise of that power; nor need we consider whether the acquisition of the stock or assets of an intrastate corporation that affected interstate commerce could be challenged by the Commission under the recent jurisdictional amendments to § 5. See n. 6, *supra*. See generally Oppenheim, Guides to Harmonising Section 5 of the Federal Trade Commission Act with the Sherman and Clayton Acts, 59 Mich. L. Rev. 821; Reeves, Toward a Coherent Antitrust Policy, 16 B. C. Ind. & Com. L. Rev. 151, 167–171.